



POLICE DEPARTMENT CITY OF NEW YORK

February 8, 2016

MEMORANDUM FOR: Police Commissioner

Re: Detective Alberto Pizarro
Tax Registry No. 934070
28 Precinct
Disciplinary Case No. 2015-13463

Lieutenant Joseph Kourakos
Tax Registry No. 924039
Housing Borough Manhattan
Disciplinary Case No. 2015-13464

Charges and Specifications:

Disciplinary Case No. 2015-13463

1. Said Detective Alberto Pizarro, on or about November 8, 2013, at approximately 1830 hours while assigned to the Narcotics Borough Bronx and on duty in the vicinity of the intersection of [REDACTED], Bronx County, abused his authority in that he stopped Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1 - STOP & FRISK

2. Said Detective Alberto Pizarro, on or about November 8, 2013, at approximately 1830 hours while assigned to the Narcotics Borough Bronx and on duty in the vicinity of the intersection of [REDACTED], Bronx County, abused his authority in that he frisked Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 - STOP & FRISK

3. Said Detective Alberto Pizarro, on or about November 8, 2013, at approximately 1830 hours while assigned to the Narcotics Borough Bronx and on duty in the vicinity of the intersection of [REDACTED], Bronx County, abused his authority in that he searched Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 3 - STOP & FRISK

4. Said Detective Alberto Pizarro, on or about November 8, 2013, at approximately 1830 hours while assigned to the Narcotics Borough Bronx and on duty in the vicinity of the intersection of [REDACTED], Bronx County, did wrongfully use force against Person A, in that he struck Person A in the face, without sufficient legal authority.

P.G. 203-11 - USE OF FORCE

Disciplinary Case No. 2015-13464

1. Said LIEUTENANT JOSEPH KOURAKOS, on or about November 8, 2013, at approximately 18:30 hours while assigned to the NARCOTICS BOROUGH BRONX and on duty in the vicinity of [REDACTED], Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he participated in the entry into the apartment of Person A without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

Appearances:

For CCRB-APU: Heather Cook, Esq.

For Respondent: James Moschella, Esq.

Hearing Date(s):

December 1 and 8, 2015

Decision:

Respondent Pizarro is Guilty of Specifications 1 and 2 and Not Guilty of Specifications 3 and 4.

Respondent Kourakos is Not Guilty.

Trial Commissioner:

ADCT Nancy R. Ryan

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on December 1 and 8, 2015. Respondents, through their counsel, entered a plea of Not Guilty to the subject charges. CCRB-Administrative Prosecution Unit called CCRB Investigator Luke Petrinovic and Detective Peter Valentin. A hearsay statement of Person A's interview with CCRB was put into evidence. Respondents called Detectives Anthony Rumph and Carlos Marchena, and testified on their own behalf.¹ Video clips were introduced into evidence. (CCRB Ex. 2). A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

¹

There was testimony during the trial that both Respondents and Detective Valentin are on modified assignment based on allegations concerning paperwork having something to do with a confidential informant but not the informant referred to in this case. (Tr. 316-18, 324)

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Pizarro Guilty of Specification 1 and 2 and Not Guilty of Specification 3 and 4 of Disciplinary Case No. 13463/15. I find Respondent Kourakos Not Guilty of Disciplinary Case No. 13464/15.

FINDINGS AND ANALYSIS

It is undisputed that on November 8, 2013, at approximately 6:30 pm, the Respondents, who were assigned to Narcotics Borough Bronx were on-duty in plain clothes in the vicinity of [REDACTED]. They were working with other members of their team, including Detectives Rumph, Marchena, Valentin, and Cintron. On that evening, the people inside Apartment [REDACTED] at that location were Person B, the tenant of record; Person A, her boyfriend; Person A's father; and Person B's young child.

When the police approached the building, Person A was outside the building and was returning through the front door. At that time, the Respondents and other members of their team followed Person A into the lobby. Respondent Pizarro stopped Person A and frisked him. It is disputed whether Respondent Pizarro searched Person A.

Person A was detained, placed in handcuffs and brought to the second floor landing. Respondents and the other team members approached Apartment [REDACTED] and, except for one member of the team who remained outside watching Person A, entered Apartment [REDACTED]. The reason Respondents entered the apartment is disputed.

When some members of the team exited Apartment [REDACTED], Person A's handcuffs were removed. He went to an area in front of the apartment door. His father and Person B were standing in the same general area. Respondent Pizarro was standing directly in front of Person A. At one point Respondent Pizarro's arm extended out in the direction of Person A. It is disputed whether he hit Person A.

Respondent Pizarro is charged with stopping, frisking, and searching Person A without sufficient legal authority and also with using unnecessary force in striking Person A in the face. Respondent Kourakos is charged with participating in the entry of Apartment [REDACTED] without sufficient legal authority.

In their testimony, the Respondents and other members of the team provided background on their reasons for being at the location that evening. They stated that a prior 911 call indicated that drugs were being sold from Apartment [REDACTED] and that two males were seen waving guns from the apartment window. (Tr. 36-37, 247) Based on this call, Detective Rumph opened an investigation into the location on or about September 21, 2013. (Tr. 35) As part of the investigation he learned that both Person B and Person A were on probation. (Tr. 37, 39) He also learned that there had been three domestic violence complaints by Person B at that location. Detective Rumph testified that the aggressor in those complaints was listed as Person A, but he did not have documentation at trial to support that particular detail. (Tr. 38-39) Detective Rumph also learned that Person B had been a witness to a June 2013 shooting that targeted Person A outside the building. (Tr. 45-46)

To further his investigation, Detective Rumph arranged to go to the location with a probation officer on October 29, 2013, and Apartment [REDACTED] was searched with no positive results. (Tr. 40-41, 83) Person B was in the apartment that day with Person A. (Tr. 84) Detective Rumph acknowledged that there was no evidence of domestic violence during that visit. (Tr. 88)

Detective Rumph next arranged for a confidential informant to go to the apartment twice and attempt to buy drugs. The informant was unsuccessful on both occasions. (Tr. 47-48, 255-57) On the second attempt, which occurred on November 7, 2013, the informant said someone in the apartment had threatened him with a gun. (Tr. 49-50, 57, 256-57) He identified that person in a photo array as [REDACTED] (Tr. 258-59)

On November 7, 2013, the team made efforts to obtain a warrant to search the premises based on the confidential informant's ("CI") information concerning the gun. (Tr. 322) The warrant application was denied because [REDACTED] did not reside at the premise. (Tr. 259) Members of the team testified that since the probation search was

negative, there were no positive drug buys and because they couldn't get a warrant, they decided to close out the investigation, which they referred to as a kite, since there was no narcotics nexus at that time. (Tr. 51, 260) According to Detectives Rumph, Marchena, and Respondents Kourakos and Pizarro it was usual to close out a kite by going to the apartment to advise the occupants of the information they had received and to tell them if anything was going on at the apartment, it should cease. (Tr. 51, 138, 192, 251-52)

The defense's position, as testified to by various team members, is that the team had no intention to enter or search Apartment [REDACTED] when they went there on November 8, 2013, but rather to conduct a home visit to simply close out the investigation. (Tr. 51-52, 61, 158, 195) However, they stated that when they approached the door of Apartment [REDACTED] they heard screaming, yelling (Tr. 58, 142-43, 170-71, 265), cursing (Tr. 143, 165-66), and a baby crying inside. (Tr. 143-44) Detective Marchena heard the voice of a male and a female "yelling, cursing, and screaming." He described it as a "huge argument." (Tr. 143) On cross-examination, he said the screaming was something similar to, "Leave me the fuck alone. Get the fuck away from me." (Tr. 170-71)

Detectives Marchena and Rumph and Respondent Kourakos testified that the door to the apartment was ajar, which it is noted could well be consistent with someone leaving briefly to take out the trash as Person A did. (Tr. 58, 173, 265) Upon hearing the voices and the baby crying, and based on the background information they had about the premises, they entered because they feared the situation was about to become violent. No occupant gave them consent to enter the apartment. (Tr. 70-71) Once inside, Person A's father was yelling and screaming at them to leave and once they saw that no one was in danger, they exited the apartment. (Tr. 147) The investigation was then closed. (Tr. 68)

CCRB argued that the team arrived at the location that day with the intention to enter the apartment since they were frustrated they couldn't get a search warrant and that their description of the screaming was in essence a pretext for entering an apartment without either consent or a warrant. In support of their argument that no exigent circumstances authorized an entry, the CCRB elicited testimony from Detective Rumph (Tr. 75) and Detective Marchena (Tr. 165, 168) that they did not hear someone calling for the police or calling for help. (Tr. 75, 165, 168) Under further questioning, Detective

Rumph acknowledged he did not hear any gunshots or anyone yelling they were being choked. (Tr. 75) Respondent Kourakos acknowledged he did not hear any glass or furniture breaking or a body being thrown against a wall. (Tr. 297-98)

The defense argued that they entered the apartment because of what they heard going on inside coupled with their other knowledge about the location and its occupants. They argued that if the team had wanted to have the apartment searched that day, they could have simply contacted Probation again and accompanied them while Probation conducted a search.

Respondent Kourakos

The question pertaining to the charge for this Respondent is whether he had sufficient legal authority to enter Apartment [REDACTED]. Respondent admits entering the apartment without a warrant and without the consent of the occupants. Rather, he testified that he knocked on the door but when no one responded he pushed the already opened door and entered. (Tr. 265-66)

The Supreme Court declared in 2012, "Officers may enter a residence without a warrant when they have an objectively reasonable basis for believing that an occupant is imminently threatened with serious injury. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. It would be silly to suggest that the police would commit a tort by entering a residence to determine whether violence is about to (or soon will) occur." *Ryburn v. Huff*, 132 S. Ct. 987, 990 (2012), *quoting Georgia v. Randolph*, 547 U.S. 103 (2006). That reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" that may show that violence was not, in fact, imminent. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving." *Ryburn*, 132 S.Ct. at 992, *quoting Graham v. Connor*, 490 U.S. 386, 396-397 (1989).

Evidence of extreme danger in the form of "shots fired, screaming or blood is not required for an officer to form a reasonable belief that there is a safety risk." *See Fletcher v. Town of Clinton*, 196 F.3d 41 (2d. Cir. 1999). The test as to what constitutes exigent circumstances is "purely objective" and "based on the totality of the circumstances

confronting [the] law enforcement agents in the particular case.” *U.S. v. Simmons*, 661 F.3d 151 (2d. Cir. 2011). The core inquiry is whether the facts, as they appeared at the moment of entry, would lead a reasonable experienced officer to believe there was an urgent need to “take action.” See *Anthony v. City of New York*, 339 F.3d 129, 135 (2d. Cir. 2003).

In this case, Respondent Kourakos testified as to what was in his mind at the time he made the decision to enter the apartment. He stated:

At this point, you know, what’s going through my head is numerous things. This apartment has prior domestic issues. There’s two felony probationers that reside there. One of which is a violent felon. Person A had just previously been a target of a shooting. It is possible somebody came back to finish it. The fact that the CI was just there the day before and had a gun pulled on him. And also, you know, it’s still a possibility that this is a drug apartment. You know it could be a home invasion going on. That coupled with, you know, a very much escalating argument going on inside. Well above what I thought was an emergency situation, you know. This was – going into that apartment was a no brainer [sic]. Something bad was going on in there. To this day I still believe I made the right choice in going there. (Tr. 265-66)

Based on his calm demeanor while testifying, and the consistency of his answers to questions on direct and cross-examination, I find that Respondent Kourakos was a credible witness. I also reject the argument that the entry into the apartment was merely a pretext for a search. First of all there is no credible evidence that a search was in fact conducted, nor were the Respondents charged with an improper search. Also, as was pointed out in the testimony, Person B was still on probation and the police could have easily accompanied a probation officer who was entitled to search the apartment as they had previously done

I find that CCRB did not prove by a preponderance of the evidence that Respondent Kourakos entered the apartment without sufficient legal authority. Based on the totality of the circumstances, at the moment of his entry, he had a reasonable basis to enter the apartment. I therefore find Respondent Kourakos Not Guilty.

Respondent Pizarro

Respondent Pizarro is charged with wrongfully stopping, frisking, searching and using unnecessary force against Person A. Person A did not appear to testify in this

proceeding despite receiving subpoenas for two separate dates to do so. His statement to CCRB investigators was introduced into evidence. (CCRB Ex. 1A and 1B)

With regard to the charges pertaining to the stop and frisk, there is no need to evaluate Person A's hearsay statement on this issue since based on the Respondent's own testimony, I find him Guilty of an unlawful stop and frisk. Under Patrol Guide Section 212-11 as it was in effect on November 8, 2013, a member of the service may only stop someone and request identification and an explanation of conduct when that member, "reasonably suspects a person has committed, is committing or is about to commit a felony or a Penal Law misdemeanor." A frisk may only be conducted if the member of service reasonably suspects he or she or others "are in danger of physical injury."

Respondent Pizarro admits that he stopped Person A and the stop is also evident from a review of the video. (CCRB Ex. 2, Clip 2) Respondent Pizarro also admits he frisked Person A and this is captured on video too. (CCRB Ex. 2, Clip 2) The question is whether he had a valid reason to conduct the stop and the frisk. When Respondent Pizarro was asked on cross-examination why he stopped Person A, he said:

I knew he was going into the building, and I knew already that I was going to stop him because of the history of the building that I know of violence, the prior shooting that was at the location probably three to six months prior to this incident. So knowing the history of violence, I was going to stop him in the lobby. Why? Because for me it was safer for me to stop him in the lobby versus stopping him outside and putting the community at risk. (Tr. 222)

Respondent further admitted that he had made the decision to stop and to frisk Person A before he had any interaction with him. He agreed that despite the fact Person A had done nothing himself to warrant a stop and frisk, Respondent Pizarro stopped and frisked Person A based on information he had about the history of the building and not the individual. (Tr. 223).

This is not a valid reason to have either stopped or frisked Person A. I therefore find Respondent Pizarro Guilty of both unlawfully stopping and unlawfully frisking Person A.

Inasmuch as Respondent Pizarro denies that he conducted a search of Person A, it is therefore necessary to examine Person A's statement and the video evidence pertaining to this issue. Person A in his statement claims that Respondent Pizarro searched him. Specifically he stated that Respondent Pizarro went into his front pockets

and his rear pockets and removed his ID from his back left pocket. (CCRB Ex. 1B, 22, 55) He further describes Respondent Pizarro as "digging" in his pockets. He stated that Respondent Pizarro put the ID in his left front pants pocket. (CCRB Ex. 1B, 23, 55)

The video pertaining to this portion of the incident shows Respondent with his back to the camera and standing directly in front of Person A who is standing against the wall of the lobby facing Respondent Pizarro. (CCRB Ex. 2, Video clip 2 at approximately 18:27:44) It is clear that Respondent Pizarro is making movements with his hands around Person A's body. Based on the quality of the video, it is not clear by a preponderance of the evidence that the movements constituted anything more than the frisk that Respondent Pizarro has admitted to conducting.

It also must be noted that Person A's description of the event was not able to be further explored through cross-examination. His description is called into question in that based on the short duration of the face to face encounter it does not appear that Respondent Pizarro was "digging" around in both the front and back pockets of Person A's clothing during the period his hands are not clearly visible on the video. (CCRB Ex. 2, Video clip 2 at approximately 18:27:44)

Further evidence in support of Respondent Pizarro's description of the event is contained on the Stop, Question and Frisk report that is in evidence. (CCRB Ex. 4; Resp. Ex. A) On that form it is indicated that Person A was stopped and frisked but not searched. Based on the credible evidence I find that the CCRB has not proven by a preponderance of the evidence that Respondent Pizarro searched Person A and I therefore find him Not Guilty of this charge.

With regard to the unnecessary use of force charge, Person A, in his CCRB interview, stated that after the handcuffs had been removed, he was standing in the doorway into Apartment [REDACTED] and asking Respondent Pizarro to give him his ID back. He further stated that after Respondent Pizarro denied having the ID he dug into his "right front left pocket," gave him the ID, and punched him in the face with a closed fist punch. (CCRB Ex. 1B, 35) He further stated that Respondent Pizarro gave him the ID with his left hand and then after Person A had the ID in his own hand, Respondent Pizarro punched him with the same left hand. (CCRB Ex. 1B, 36) Person A indicated that a neighbor, Person B, and his father were there when he got punched. (CCRB Ex. 1B,

37) After he was punched, Person A said he stumbled backwards and his eye was watery. (CCRB Ex. 1B 39-40, 42-43) Person A stated that he went to the hospital, but no medical records were offered into evidence. (CCRB Ex. 1B, 7) Respondent Pizarro testified that he did not punch Person A. (Tr. 212) He testified that words were exchanged between him and Person A and when Person A started to approach he raised his hand "to keep our distance." (Tr. 212)

A review of the video shows that at some point, Respondent Pizarro's arm does extend towards Person A as they are both standing near the doorway into Apartment ■. (CCRB Ex. 2, Video Clip 3 at approximately 18:31:40) The video does not support by a preponderance of the evidence that Respondent Pizarro punched or even made contact with Person A's eye. There is no clear picture of any closed fist punch as described by Person A. Nor is Person A seen to be stumbling backward or making any gesture, such as putting his hand up to his eye, to indicate his eye was sore or watering after the alleged punch. Again while the video is not completely clear, there also does not appear to be a period of time when Respondent Pizarro is going into his own pocket to retrieve an ID card as Person A stated.

Person A's hearsay account lacks corroboration from anyone present, including his father and girlfriend. No statements or testimony from either witness was presented to this tribunal. There were also no hospital records presented as evidence indicating some eye injury. Since the record has not proven by a preponderance of the evidence that Respondent Pizarro struck Person A in the face, I find him Not Guilty of this charge.

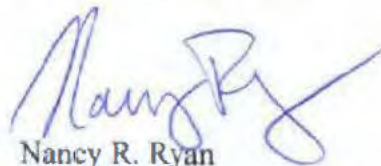
PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent Pizarro was appointed to the Department on January 20, 2004. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB requested a penalty of the forfeiture of 30 vacation days for the four specifications. Respondent has been found guilty of two of those, the unlawful stop and unlawful frisk. Accordingly, I recommend that Respondent's penalty be the forfeiture of 3 vacation days. This is consistent with recent precedent. See Disciplinary Case Nos.

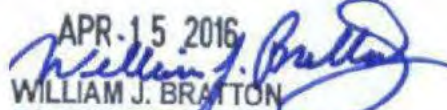
2014-11787 & 2014-11788, signed October 13, 2015 (Adler) in which two eight-year police officers with no prior disciplinary record forfeit two vacation days each for stopping complainant without sufficient legal authority. Respondents were at most justified in making a level-two inquiry to speak with complainant about their concern that he might be carrying an illegal gravity knife. Neither Respondent provided enough detail to establish reasonable suspicion. See also Disciplinary Case No. 2014-11138, signed September 22, 2015 (Maldonado) in which seven-year police officer with no prior disciplinary record forfeits two vacation days for frisking complainant without sufficient legal authority. Respondent acted reasonably when she touched the visible bulge in complainant's pocket. Her frisk of his legs, chest, and back, however, was without legal justification. Respondent admittedly did not see anything indicating that complainant had a weapon in those areas. The record is also devoid of any other articulable fact that would support a finding that she reasonably suspected that she was in danger of physical injury after confirming that the only bulge she observed was complainant's cell phone.

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

APR 15 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE ALBERTO PIZZARO
TAX REGISTRY NO. 934070
DISCIPLINARY CASE NO. 2015-13463

Respondent was appointed to the Department on January 20, 2004. In his last three annual performance evaluations, he received a 4.0 "Highly Competent" in 2014, and a 4.5 "Highly Competent/Extremely Competent" in 2013 and 2012.

[REDACTED]

He has been on Level 2 Disciplinary Monitoring since November 14, 2014. He has no prior formal disciplinary adjudications.

For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner Trials